

**MARLIN & SALTZMAN, LLP**  
Stanley D. Saltzman, Esq. (SBN 090058)  
Louis M. Marlin, Esq. (SBN 54053)  
Marcus J. Bradley, Esq. (SBN 174156)  
Kiley L. Grombacher, Esq. (SBN 245960)  
29229 Canwood Street, Suite 208  
Agoura Hills, California 91301  
(818) 991-8080; Fax (818) 991-8081  
ssaltzman@marlinsaltzman.com  
louis.marlin@marlinsaltzman.com  
mbradley@marlinsaltzman.com  
kgrombacher@marlinsaltzman.com

**LAW OFFICES OF RHEUBAN & GRESEN**  
Solomon E. Gresen, Esq. (SBN 164783)  
Steven V. Rheuban, Esq. (SBN 48538)  
15910 Ventura Boulevard, Suite 1610  
Encino, California 91436  
Telephone: (818) 815-2727  
Facsimile: (818) 815-2737  
seg@rglawyers.com  
svr@rglawyers.com

Attorneys for Plaintiffs Evan Hightower , Ann Ross,  
Regina M. Simpson and Regina Sturdivant

*(Additional Counsel Information on Subsequent Page)*

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

EVAN HIGHTOWER and ANN )  
ROSS, individually and on behalf of )  
other individuals similarly situated )  
  
Plaintiffs, )  
  
v. )  
  
JPMORGAN CHASE BANK, N.A., )  
and DOES 1-10, Inclusive, )  
  
Defendants. )

**CASE NO. CV11-01802-PSG (PLAx)**

Related Cases:  
2:11-cv-04294-PSG-PLAx  
11-cv-6061-PSG-FMOX  
11-cv-03428-PSG-PLAx  
11-cv-08147-PSG-PLAx  
11-cv-09727-PSG-JC

Hon. Philip S. Gutierrez

**REPLY IN SUPPORT OF MOTION  
FOR TOLLING OF STATUTE OF  
LIMITATIONS FOR FLSA CLASS  
MEMBERS**

DATE: January 30, 2012  
TIME: 1:30 p.m.  
CTRM: 880

**Reply In Support of Motion for Tolling Statute of Limitations for  
FLSA Class Members**

**Case No. CV11-01802-PSG (PLAx)**

1  
2 Raul Perez (SBN 174687)  
rperez@initiativelegal.com  
3 Melissa Grant (SBN 205633)  
mgrant@initiativelegal.com  
4 Suzy E. Lee (SBN 271120)  
suzylee@initiativelegal.com  
5 **INITIATIVE LEGAL GROUP APC**  
1800 Century Park East, 2nd Floor  
6 Los Angeles, California 90067  
Telephone: (310) 556-5637  
7 Facsimile: (310) 861-9051

8 Jonathan Shub (SBN 237708)  
jshub@seegerweiss.com  
9 **SEGER WEISS LLP**  
1515 Market Street, Suite 1380  
10 Philadelphia, PA 19102  
Telephone: (215) 564-2300  
11 Facsimile: (215) 851-8029

12 William B. Sullivan (SBN 171637)  
13 Kevin D. Sullivan (SBN 270343)  
ksullivan@sullivanandchristiani.com  
14 **SULLIVAN & CHRISTIANI, LLP**  
2330 Third Avenue  
15 San Diego, California 92101  
Telephone: (619) 702-6760  
16 Facsimile: (619) 702-6761

17 Attorneys for Plaintiffs  
Carolyn Salazar and Roger Al-Chaikh  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## I. INTRODUCTION

Defendant's Opposition to Plaintiff's Motion to Toll is littered with inapposite and out of circuit authority, which does little more than convolute the simple issue before this Court— namely, whether the delay stemming from the coordination and consolidation of the cases pending before this Court amount to “extraordinary circumstances” which necessitate the issuance of a brief toll of the statute of limitations for putative class members. While Defendant devotes substantial portions of its Opposition papers to legislative authority and extra-jurisdictional authority, the law in the Ninth Circuit is clear on the issue of equitable tolling. In this Circuit, “[e]quitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir.1999) (emphasis added). In fact, the Ninth Circuit has implied the doctrine of equitable tolling into the Fair Labor Standards Act (“FLSA”) upon which many of the claims in this action are predicated. *Partlow v. Jewish Orphans Home of Southern Cal., Inc.* 645 F.2d 757, 760 (9th Cir.1981) (abrogated on other grounds by *Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480); see *Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1140 (D.Nev.1999) (recognizing the implication).

Plaintiff submits that the weeks spent by the parties and the Court consolidating and coordinating these cases justifies the brief toll requested, particularly as Defendant will not be prejudiced by such relief. As the district court aptly noted in *Beauperthuy v. 24 Hour Fitness USA, Inc.*:

[E]quitable tolling concerns itself with the equities of dismissal for untimely filing caused by factors independent of the plaintiff. Accordingly, we must ask whether it would be unfair or unjust to allow the statute of limitations to act as a bar to [a plaintiff's] claim.

*Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2007 WL 707475 at \*8 (N.D.Cal. Mar.6,

1 2007.)

2 The efforts expended by the Court and parties in consolidating the various  
3 cases pending before this Court far exceeds the usual delays that routinely occur in  
4 the ordinary course of litigation and which have been deemed by other courts  
5 insufficient to merit the relief requested herein. Accordingly, it would be unfair to  
6 permit such extraordinary delays, which were outside the control of the Plaintiffs and  
7 the putative class members, to have the practical effect of robbing the class members  
8 of their rightful claims. As such, Plaintiffs request that this Court issue a limited toll  
9 lasting from the time of this Order to the date on which Notice is mailed (or an order  
10 denying the mailing of notice is issued) and for any other and further relief that is just  
11 and proper.

## 12 **II. ANALYSIS**

### 13 **A. The Consolidation Delay Constitutes An Extraordinary** 14 **Circumstance Necessitating the Brief Toll**

15 In its Opposition papers, Defendant disputes that the delays suffered in  
16 these litigations amount to the extraordinary circumstances necessary to justify  
17 issuance of the toll. Specifically, Defendant transparently characterizes the  
18 consolidation as “ordinary litigation circumstances” and argues that they “do not  
19 warrant the extraordinary and drastic remedy of tolling the potential collective  
20 action members’ statute of limitations”. (Opposition [Dkt. 38] at 4.) The flaws in  
21 this argument are two fold: (1) the delays in this case clearly exceed “ordinary  
22 litigation circumstances”; and (2) the legal authority upon which the argument is  
23 predicated are inapposite.

24 First, the unique delays at issue here stem from coordinating and  
25 consolidating multiple cases implicating numerous and divergent state and federal  
26 laws. These issues are both uncommon and far more complex than those typically  
27

1 encountered in FLSA litigation (such as in the cases cited by Defendant). While  
 2 discovery disputes and motion practice – both of which delay litigation– are  
 3 inherent to most litigation, grappling with issues of multi-case consolidation are  
 4 far rarer.

5 Secondly, the “procedural” cases cited by the Defendant are factually  
 6 distinguishable<sup>1</sup>. None of the cases involve the unusual and length delays stem  
 7 from consolidation – the very factual scenario before this Court.

8 Not surprisingly, Defendant turns a blind eye to the numerous opinions that  
 9 expressly grant equitable tolling of FLSA claims where the case's litigation  
 10 posture delayed consideration of the motion for conditional certification and  
 11 notice. See, e.g., *Stickle v. SCIWestern Market Support Center, L.P.*, 2008 WL  
 12 4446539, at \*21–22 (D.Ariz. Sep.30, 2008) (equitably tolling the FLSA statute of  
 13 limitations where court delayed ruling on the plaintiffs' collective action pending  
 14 determination of defendant's motion to dismiss); *Beauperthuy v. 24 Hour Fitness*  
 15 *USA, Inc.*, 2007 WL 707475 at \*8 (equitably tolling FLSA statute of limitations  
 16 because of factors outside plaintiffs' control, including litigation and the  
 17 competition between attorneys that occurred during the settlement of related  
 18 action); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 199 (S.D.N.Y.2006)

---

19  
 20 <sup>1</sup> Specifically, *Hintergerber v. Catholic Health Sys.*, No. 08-CV-380S, 2009 WL  
 21 3464134, at \*15 (W.D.N.Y. Oct. 21, 2009); *Ketchum v. City of Vallejo*, 523 F. Supp.  
 22 2d 1150, 1156 (E.D. Cal. 2007); *Cranney v. Carriage Servs., Inc.*, No.  
 23 2:07-cv-01587, 2008 WL 820140, at \*2 (D. Nev. Mar. 20, 2008); *Woodard v. FedEx*  
 24 *Freight East, Inc.*, 250 F.R.D. 178, 194 (M.D. Pa. 2008); *Lewis v. Wells Fargo & Co.*,  
 25 669 F. Supp. 2d 1124, 1129 (N.D. Cal. 2009); *Pendlebury v. Starbucks Coffee*  
 26 *Co.*, 2008 WL 700174, at \*4 (S.D. Fla. Mar. 13, 2008); *Veliz v. Cintas Corp.*,  
 27 No.03-1180, 2007 WL 841776, at \* 5 (N.D. Cal. Mar. 20, 2007); *Huynh v. Chase*  
 28 *Manhattan Bank*, 465 F.3d 992, 1004(9th Cir. 2006); *Goudie v. Cable*  
*Communications, Inc.*, No. 08-507, 2008 WL 4861649, at \*3 (D. Or. Nov. 8, 2008);  
 and *Noble v. Serco, Inc.*, 2009 WL 3254143, at \*3 (E.D. Ky. Oct. 7, 2009).

1 (“Where parties are ordered or agree by stipulation to suspend proceedings during  
2 the pendency of legal proceedings, the time during which a party is prevented  
3 from obtaining legal relief is not counted for purposes of statutes of limitations.”).

4 Tolling is similarly merited here. If not tolled, the statute of limitations  
5 could deprive consenting employees of their right of action. *Partlow*, 645 F.2d  
6 761; see also *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 199 (S.D.N.Y.2006)  
7 (holding that “the time during which a party is prevented from obtaining legal  
8 relief is not counted for purposes of statutes of limitations.”). Here, the Court has  
9 not yet made a determination as to Plaintiffs' collective action notification. To  
10 complicate the matter, based on discussions with the magistrate, it appears that  
11 precertification communications will be sent to a percentage of the putative class  
12 members for the purposes of conducting discovery. Such communications will  
13 have the practical effect of notifying these individuals of the pending litigation.  
14 These randomly selected class members will be afforded the opportunity to  
15 preserve their claims, yet other class members will receive no notification until  
16 after the motion for conditional certification has been filed. The inequity of this  
17 situation is clear.

18 As the Supreme Court noted in *Hoffman-La Roche Inc. v. Sperling*, 493  
19 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989), the inherent benefits of the  
20 collective action “will disappear” if plaintiffs are not notified of the suit before  
21 their statute of limitations expires. Similarly, here, if the statute of limitations is  
22 not tolled the consolidation process will rob Plaintiffs of the time from the filing  
23 of their complaints until the time that the Court can hear and decide the motion for  
24 conditional class certification.

25 **B. Despite its Protestations, Defendant Will Not Be Prejudiced**

26 While Defendant contends that any tolling of the statute of limitations  
27

1 would prejudice Defendant, this argument is unavailing. Chase contends that if  
2 the Court were to permit tolling it would effectively lose the benefit of the now  
3 running statute of limitations clock. Such "prejudice" could be found in any  
4 FLSA case, yet Courts in the Ninth Circuit consistently order equitable tolls in  
5 FLSA cases. See, e.g., *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2007 WL  
6 707475 at \*8 (N.D. Cal. Mar. 6, 2007); *Adams v. Inter-Con Security Systems*, 242  
7 F.R.D. 530, 542-543 (N.D. Cal. April 11, 2007); *Castle v. Wells Fargo Financial,*  
8 *Inc.*, 2007 WL 1105118 at \*1 (N.D. Cal. Apr. 10, 2007). Defendant does not-and  
9 cannot-point to any reason why it would suffer prejudice due to equitable tolling  
10 which would be unique to the circumstances of this action, instead relying on a  
11 vague and conclusory pronouncement.

12 As the Ninth Court explained, statutes of limitations are designed to ensure  
13 fairness to defendants and to "notify them of claims that they must defend before  
14 the claims grow stale." *Partlow*, 645 F.2d at 761 (citing *Burnett v. New York*  
15 *Central Railroad*, 380 U.S. 424, 428 (1965)). Defendant has been fully aware of  
16 its scope of potential liability for more than a year, and has had unlimited and  
17 exclusive access to the putative class members and their payroll/time records to  
18 thoroughly investigate their claims. Accordingly, Defendant cannot truly be heard  
19 to argue that it would be prejudiced by the brief toll requested.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///



1           **V.     CONCLUSION**

2           Based on the foregoing, Plaintiffs respectfully request that this Court issue  
3 an order tolling the statute of limitations for the putative class members' FLSA  
4 claims until the date Notice is mailed (or an order denying the mailing of notice is  
5 issued) and for any other and further relief that is just and proper.

6  
7 DATED: January 13, 2012

**Marlin & Saltzman LLP**

8  
9 By: /S/ Kiley L. Grombacher  
          Marcus J. Bradley  
          Kiley L. Grombacher

10  
11 **Co-Lead Counsel for Plaintiffs  
and Plaintiffs' Liaison Counsel**

12 DATED: January 13, 2012

**Initiative Legal Group APC**

14 By: /S/ Suzy E. Lee  
          Raul Perez  
          Melissa Grant  
          Suzy E. Lee

15  
16 **Co-Lead Counsel for Plaintiffs**